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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 JANE DOE 1 AND JANE DOE 2, et
5 al.,

6 Plaintiffs,

7 v.

8 15 CV 3849 (AKH)

9 THE CITY OF NEW YORK, et al.,

10 Defendants.

11 -----x
12 New York, N.Y.
13 April 21, 2017
14 11:54 a.m.

15 Before:

16 HON. ALVIN K. HELLERSTEIN,

17 District Judge

18 APPEARANCES

19 CLEARY GOTTLIEB STEEN & HAMILTON LLP
20 Attorneys for Plaintiffs

21 BY: MITCHELL A. LOWENTHAL
22 JAMES L. BROMLEY
23 ABIGAIL MARION
24 -and-

25 THE LEGAL AID SOCIETY
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1 THE COURT: The purpose of this proceeding is to
2 evaluate the motion by the defendant Santiago for a 60-day
3 continuance in the trial. The trial is supposed to begin
4 May 8. The final pretrial conference has been scheduled for
5 May 1. So I called this session to deal with the motion for a
6 continuance.

7 Mr. Castro.

8 MR. CASTRO: Good morning, your Honor.

9 THE COURT: You may proceed.

10 MR. CASTRO: Thank you, your Honor.

11 By way of background, none of this should be new to
12 the Court. However, for the benefit of the record, I'll begin
13 at the beginning.

14 Mr. Santiago had a stroke on January 15. This we know
15 is a fact, a medical fact. Since that time --

16 THE COURT: So it was a what?

17 MR. CASTRO: A stroke.

18 THE COURT: Yes.

19 MR. CASTRO: He suffered a stroke. It's a medical
20 fact that he had a stroke on January 15. He has not returned
21 to work since and hasn't been cleared by his doctors to return
22 to work since that time. There has been no determined date of
23 return to work in any capacity, light or full duty, as a
24 correction officer.

25 THE COURT: What kind of stroke was it?

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1 MR. CASTRO: Your Honor, I don't know the medical term
2 of the stroke. I'm not a doctor, respectfully. I believe it
3 is in my declaration. It was called a cardiovascular accident,
4 CVA, of the right middle cerebral artery, while at work. That
5 is my declaration at paragraph 5.

6 THE COURT: But you don't have a neurologist saying
7 that?

8 MR. CASTRO: We do. We have we attached to my
9 declaration medical documents at Exhibit A from Lenox Hill
10 Neurosurgery indicating from Dr. Rafael Alexander Ortiz that he
11 had a stroke on 1/15/2017.

12 In addition to that, your Honor, he underwent
13 treatment, a surgery, to relieve -- to allow for better flood
14 flow into his brain on March 3, 2017, called a femoral cerebral
15 angiogram and carotid artery stenting, again, on March 3.
16 That's my declaration at paragraph 11.

17 We, our firm, I did not receive notice of this until
18 March 23 when I contacted him. Actually, he returned my call
19 finally after an email to him to discuss the trial date, which
20 had been scheduled very shortly before March 23. Upon learning
21 that he had a stroke on January 15, I asked him why he did not
22 previously tell us that he had a stroke. His response to me
23 was I didn't remember about this case. I asked him then, I
24 don't understand why you did not remember about this case. He
25 said I just don't remember. At that moment, I had asked him to

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1 be prepared to receive HIPAA release forms by me to obtain all
2 the medical records concerning his stroke from all the doctors
3 that he saw regarding it.

4 Shortly after that conversation, we had a conference
5 call with all parties regarding I believe the scheduling of
6 various pretrial deadlines. I then informed them of what
7 Mr. Santiago had told me. Our joint letter of I believe
8 April 4, 2017, beginning the process of seeking a 60-day
9 continuance, thereafter followed. In that letter I informed
10 the Court and all sides, as I did verbally on March 23, that we
11 would share all the medical records that we receive from his
12 doctors concerning the stroke. To this date we have.

13 Taking a step back. I then, after that conversation
14 with all sides on March 23, I then recontacted Mr. Santiago
15 that day. I asked him if I could -- if there was somebody with
16 whom I could speak in his family, someone that he perhaps lived
17 with. And shortly after that I ended up speaking with Jasmine
18 Santiago. I asked her if in fact Mr. Santiago suffered a
19 stroke. She said that he had. I asked her how he was at that
20 stage in terms of his memory, in terms of his fitness from what
21 she's seen, not necessarily her medical opinion. She is not a
22 doctor. She told me -- and this is detailed in her declaration
23 which I provided to the Court -- that he has memory problems
24 that she's personally witnessed.

25 To the extent that this Court wishes to hear from

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1 Ms. Santiago, we have her here today. However, I will say that
2 except for adding to, adding examples to what's already in her
3 declaration, she would testify precisely what the declaration
4 says. Given her declaration, which was what she originally
5 told me concerning his memory, his attention span, and the
6 like, we had serious concerns at that point about the
7 preparation for trial.

8 Ms. Santiago told me that she, to refresh
9 Mr. Santiago's memory, told him, father, do you recall being
10 deposed in this case? And what her words to me were that he
11 said no.

12 THE COURT: You yourself worked with the client?

13 MR. CASTRO: I have since December of 2016, Judge.

14 THE COURT: More recently.

15 MR. CASTRO: I have spoken to him on a very regular
16 basis. I had indicated in the joint letter of April 4 that I'm
17 in regular, at that point daily communication with him to not
18 only ensure that he was going to get back to us at that point
19 the HIPAA release forms, which frankly I've entrusted upon
20 Ms. Santiago to do that for me, but also to test how much he
21 can endure prepping.

22 Frankly, your Honor, I have not been able to go longer
23 than about 20 to 25 minutes on the phone with him. And I have
24 seen --

25 THE COURT: Say that again.

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1 MR. CASTRO: I have not been able to go longer than 20
2 to 25 minutes on the phone with Mr. Santiago.

3 THE COURT: What happens?

4 MR. CASTRO: In the beginning, middle, and end of the
5 conversations, you could tell he struggles with answering
6 questions. Not every question, your Honor. I ask him his
7 name, he'll give it to me immediately. But when we get to the
8 details of the case, when we get to details of his regular
9 life, I've tested both his day-to-day activities, as well as
10 what the allegations are here.

11 THE COURT: Was he examined at deposition?

12 MR. CASTRO: Was he examined at the deposition, yes,
13 he was. I personally was not present. Prior counsel, Julie
14 Ortiz, was there, but he was examined in a deposition.

15 THE COURT: Was he planning to testify?

16 MR. CASTRO: Yes, he was.

17 THE COURT: Is he able to testify?

18 MR. CASTRO: Frankly, I'm not a doctor, your Honor,
19 but I have not seen --

20 THE COURT: There's no medical indication in the file
21 that indicates he can't. I'm asking you as his lawyer.

22 MR. CASTRO: Frankly, I do not think that he can,
23 Judge. I have seen him myself personally. I've spoken to him
24 on the phone. I don't think that the way he presents himself
25 now in terms of ability to understand my question, not all

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1 questions, your Honor. I don't want to overstate it that he
2 cannot speak or understand basic questions. But the reality is
3 that oftentimes I could hear him -- he delays in answering it.
4 I believe he struggles answering questions, not about this case
5 necessarily, but about other things.

6 His daughter has told me -- and this is in her
7 declaration -- that he has gotten lost in areas that should be
8 familiar to him. She has further told me that they drive him
9 to appointments because they believe that he'll get lost again.
10 For those reasons --

11 THE COURT: This is not likely to change in 60 days.

12 MR. CASTRO: I don't know that it will, your Honor,
13 but I do think that -- and I had this discussion with the
14 doctor, doctor staff, not the doctor himself. It was told to
15 me that at the time of the declaration that they needed time to
16 understand what his present condition was more fully than they
17 do now. That is the basis of the application, the ability to
18 allow for more time to understand his condition.

19 Ms. Santiago indicated in her declaration and has told
20 me personally that she would stand up for her father and be a
21 guardian ad litem if one were needed. In our memo of law, we
22 had indicated that with due regard to the Court's questions as
23 to whether it had the authority, which we answered in the
24 affirmative, we don't know that one is necessary yet.

25 THE COURT: A guardian.

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1 MR. CASTRO: That's correct. So there are
2 unfortunately at this point more questions that we have than
3 answers. But the most important question that we can answer
4 now is that I have personally seen him struggle with answering
5 some questions, frankly, many questions in the beginning, the
6 conversations. I have personally seen him struggle with the
7 length of conversations that I've had with him. And I have
8 examined myself Ms. Santiago today and discussed on the phone
9 today personally and discussed on the phone with her her
10 declaration. I have no reason to disbelieve what she has
11 ultimately put in her declaration and what she told me about
12 his day-to-day routines.

13 THE COURT: I'm looking at the letter from Dr. Antonio
14 Joseph, who apparently is a specialist in nephrology.

15 MR. CASTRO: Yes, Judge.

16 THE COURT: He states that Mr. Santiago was a patient
17 of the medical center, NYU Langone Medical Center, for the past
18 six years, mentions the stroke and partial disability.

19 What's of interest here, the letter goes on to say he
20 also has severe memory loss, short term and long term, as a
21 result of his cerebrovascular accident. His condition is
22 unlikely to improve in the near future and no date can be
23 predicted for improvement. His ability to participate in a
24 trial or assist in his defense is limited.

25 I have a question because, first of all, this

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1 Dr. Joseph, who may be a wonderful doctor, is a nephrologist.

2 MR. CASTRO: Yes, Judge, I understand that.

3 THE COURT: And the medical reports from the
4 neurosurgeon doesn't speak to these issues.

5 MR. CASTRO: Right. In our joint letter and as I had
6 promised all sides during our phone conference of March 23 that
7 we would share all the medical records we got related to his
8 stroke. That was one of them. I had I believe this week sent
9 to plaintiffs' counsel at their request the medical records. I
10 searched to see if I received additional records as compared to
11 the ones that were submitted in the declaration. I believe the
12 initial submission mirrored the one that I emailed to
13 plaintiffs' counsel this week.

14 That is there not as an expert in neurology.

15 Dr. Joseph, respectfully, is not a neurologist. He is a kidney
16 specialist. But we included it, frankly, because it was part
17 of our package.

18 THE COURT: There's nothing else in the record that
19 speaks to a prognosis.

20 MR. CASTRO: Well, that's why we had the declaration
21 of Ellen Braunstein and not Dr. Joseph. She is a neurologist
22 and she is treating him for this memory loss, attention. She's
23 trying to determine, as her declaration indicates, a diagnosis.
24 And to that end she had scheduled several tests. That's
25 paragraph 2 of her declaration.

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1 THE COURT: Let me get there.

2 All right. Let me hear from the plaintiff.

3 MR. CASTRO: May I mention one more thing, your Honor?

4 THE COURT: Yes. I'm sorry, I thought you were
5 finished.

6 MR. CASTRO: I should have added this in the beginning
7 that to update the Court, and all sides, for that matter, on
8 what it is his status is in terms of tests and treatment. We
9 understand that he is scheduled for an examination on Monday --
10 excuse me, your Honor, I just have to locate it.

11 THE COURT: It's okay.

12 MR. CASTRO: He is scheduled for an appointment on
13 Monday to take more tests that were prescribed by
14 Dr. Braunstein.

15 THE COURT: April 24.

16 MR. CASTRO: I believe so, yes, your Honor. I seem to
17 be missing my note. I believe it's Monday. And I have been
18 told that he's in the process of and they're working with him
19 to get involved in this process a neuropsychologist, who, along
20 with the neurologist, could examine and review the tests that
21 he's already taken and that he will be taking, I believe, on
22 Monday. And I learned of this yesterday evening during my
23 conversation with Mr. Santiago's daughter and, in part,
24 Mr. Santiago.

25 THE COURT: So I assume from all of this that

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1 Mr. Santiago will not be in a position to testify and his
2 ability to make decisions that clients have to make in the
3 context of a trial would be limited. I further assume that
4 there is no prognosis that the conditions will be improved in
5 any reasonably short period of time. So that this condition,
6 although it's possible to be alleviated over a lengthy period
7 of time, is not likely to be alleviated within the next two,
8 three months.

9 I also understand that either you or your predecessors
10 have been able to work with Mr. Santiago in the past and
11 prepare him for deposition, where he must have been asked all
12 the questions that would be pertinent to the issues of
13 liability and what happened. Of course, if he had plans to
14 testify and plans to contradict the testimony of the
15 plaintiffs, he'd be handicapped. But given the fact that he
16 testified and it was extensive pretrial discovery of the
17 plaintiffs and of Mr. Santiago and of others, I don't know that
18 we have any problem different from an unavailable important
19 witness.

20 Let me stop there with that and see where other
21 arguments lead. Does the city want to speak also, Mr. Larkin?

22 MR. LARKIN: I could just briefly, your Honor.
23 Obviously, I don't have any firsthand knowledge about
24 Mr. Santiago.

25 THE COURT: Your knowledge is derivative. To the

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1 extent that you felt that Mr. Santiago's testimony would have
2 helped the city's case, you're prejudiced by his not being
3 available. I understand that. Except that we don't know when
4 he will be available.

5 MR. LARKIN: The declaration from the neurologist
6 suggests that further tests will at least inform the Court's
7 decision and inform everyone's I guess assessment of what his
8 actual condition is and whether he'll be in a position to
9 participate fully in the trial at some point.

10 I think the Court is correct. The city's liability is
11 derivative of any finding by the jury that Santigo violated
12 either of the plaintiff's rights. So to the extent Santigo
13 can't participate in his defense, the city's defense in the
14 case is affected.

15 So we share the same concern that our codefendant
16 shares with regards to proceeding at this point. He's not just
17 an unavailable witness. He's the main actor.

18 THE COURT: You had an opportunity to examine him and
19 cross-examine him at deposition.

20 MR. LARKIN: We were there, yes. Of course, we were
21 there and had a few questions at the deposition. You don't ask
22 every question at a deposition.

23 THE COURT: You make a calculated decision.

24 MR. LARKIN: Right. You don't work on the assumption
25 that the witness is going to be unavailable. Certainly you

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1 would not conduct a deposition in this case with there's only
2 one individual defendant and only one officer whose conduct is
3 at issue in the case. You would assume that person would be
4 available for trial.

5 THE COURT: I got you. Let me see what the plaintiff
6 says. Mr. Lowenthal.

7 MR. LOWENTHAL: Thank you, your Honor. We take a very
8 different view of what they claim the facts to be. Let me
9 start with just a few basics. As your Honor recounted, we're
10 on the eve of trial. We're on the eve of trial. The last
11 pretrial filings are due Monday. The only thing after that is
12 the final pretrial conference and then we start the trial. So
13 this is beyond the 11th hour.

14 It is their burden, the city and Mr. Santiago, who are
15 jointly appearing before the Court in seeking this continuance
16 to demonstrate a need at this late hour after counsel, after
17 our experts, after everybody was arranging their schedule.

18 THE COURT: They demonstrated a need for further
19 medical information. They've shown that the client is
20 substantially unavailable to them. I've got to weigh the
21 interest of the plaintiffs in having a trial against the
22 interest of the defendant in being able to testify and act in
23 relation to the defense. It's a balancing test.

24 MR. LOWENTHAL: I understand your Honor's position and
25 there's no question that it is a balancing test, it's based

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1 upon discretion, and there's no question that it's the
2 defendant's burden. But what you have just heard today is not
3 the facts that are in this case and it's not the facts as
4 demonstrated just by the papers that the defendants put before
5 you.

6 THE COURT: What are the different facts?

7 MR. LOWENTHAL: Let me explain. There's no dispute
8 that Santiago had a stroke on January 15. But not one medical
9 record produced from that date until March 20, which is the day
10 your Honor set the trial date, not one medical record indicates
11 that he had any memory problem, much less a diagnosis that his
12 cognitive state was in any way impaired. The only neurological
13 problem that is identified in any of those medical records is
14 that his left hand shook. That's it. Nothing about cognition
15 and nothing about memory.

16 In fact, when, as Mr. Castro told you, he had a
17 surgical procedure, a stent was put into his carotid artery.
18 And what the records show is that the doctors explained the
19 risks and rewards to Mr. Santiago and they relied on his
20 consent to do that surgery. So the neurologists who were
21 treating him not only didn't think he had a memory or cognition
22 problem. They bet their medical licenses on that fact.

23 THE COURT: Well, Mr. Lowenthal, this occurred at the
24 time he came in for the stroke.

25 MR. LOWENTHAL: No. He had the stent put in on

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1 March 3. He came in for the stroke on January 15. If I can
2 show your Honor.

3 THE COURT: Show me the exhibit.

4 MR. LOWENTHAL: For example, if you look -- I don't
5 know whose declaration you have. We put in one.

6 THE COURT: I'd rather look at the medical exhibits.

7 MR. LOWENTHAL: We put in the medical exhibits
8 identical to the ones that Mr. Castro did, but we numbered the
9 pages so it's easier to find where they are. If, for example,
10 you look in Exhibit 2, at the bottom it says page 4.

11 THE COURT: Yes.

12 MR. LOWENTHAL: You'll see that's Mr. Santiago's own
13 signature saying I have read and understand the instructions
14 and I understand it is important to follow these instructions.
15 That's his discharge from the hospital on January 18. They
16 told him what he could do and what he couldn't do and they had
17 him sign that.

18 Further, if you look in tab one on page 10, it's a
19 letter. Excuse me, your Honor, have the wrong page. It's
20 page 6 of tab 1.

21 THE COURT: Yes.

22 MR. LOWENTHAL: If you see under the heading
23 procedure, this is the report by the neurologist who did the
24 surgery, an appropriate consent was obtained from the patient.
25 Mr. Santiago is the one who consented to the surgery. This is

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1 on March 3, two weeks before your Honor set the trial date.
2 Until that point, if you look in the prior paragraph, there's
3 one example under indications, he, the neurologist who did the
4 surgery, says, and it's the third line from the bottom, it
5 starts he has a slight pronator drift and fix on the left,
6 meaning his hand shakes a little on the left. Neurological
7 exam is otherwise normal.

8 THE COURT: If I had to base my determination on
9 Mr. Santiago's cognitive ability at this point in time, I would
10 not feel comfortable relying on any of these papers. I would
11 need to have an examination myself.

12 MR. LOWENTHAL: Well, your Honor, let me address that
13 as well, if I could. There's two more sets.

14 THE COURT: We have time to do that.

15 MR. LOWENTHAL: Well, if you want to have -- I
16 understand what you're saying, your Honor, but we're here
17 today. You issued an order about what they were supposed to.

18 THE COURT: Go on.

19 MR. LOWENTHAL: And let me further state, if I may.

20 THE COURT: I find this a very difficult issue to deal
21 with. I want to be fair to both sides. It's my job. And if I
22 felt that there was a prognosis of recovery within the near
23 frame of time, say 60 days, the argument for postponing it
24 would be very strong. But we don't have such an indication.
25 And if it was a longer indefinite time, I think the interests

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1 of the plaintiffs in an early trial outweigh the interest of
2 the defendant at this point.

3 But we're told there are going to be important tests
4 on Monday. We can certainly wait for that.

5 MR. LOWENTHAL: Your Honor, if I may, I think
6 Mr. Castro was being candid in saying he really didn't know
7 when these tests were being conducted and he didn't have his
8 notes. Maybe they're Monday.

9 THE COURT: I'm assuming they are Monday.

10 MR. LOWENTHAL: Even if so, your Honor, the stroke was
11 January 15. What I've just shown you --

12 THE COURT: I take your point. It's their burden.
13 What you say is informative, but I've had enough experience
14 with consents in medical procedures not to put the kind of
15 reliance on them for the purposes of showing cognition that you
16 argue. It's a persuasive point but not a conclusive point.

17 MR. LOWENTHAL: Let me continue, if I may, your Honor.
18 There is nothing that's submitted to the Court from any of the
19 physicians that actually treated Mr. Santiago in connection --
20 let me continue, your Honor, and deal with the other
21 physicians. But to close this, there isn't anything that your
22 Honor received from any of the physicians who actually treated
23 Mr. Santiago for his stroke, who treated him for two and a half
24 months. They saw him on January 15 and last saw him on
25 March 6. There is, as I said, there's not a word in their

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1 medical records about any cognitive problems.

2 THE COURT: The neurosurgeon would be expected to
3 comment about cognition loss. That's part of the baggage that
4 goes with a stroke. There is no comment.

5 MR. LOWENTHAL: No comment whatsoever, except an
6 affirmative comment that aside from a shaking hand, his
7 neurological exam was normal.

8 THE COURT: Mr. Lowenthal, I take all this.

9 MR. LOWENTHAL: Let's move on to the next set.

10 THE COURT: Enough with this. If there are going to
11 be important tests on Monday, we could assemble on Wednesday
12 and I could have Mr. Santiago come here and make an assessment.
13 I can have Dr. Braunstein come here and testify.

14 She's now the treating neurologist, right, Mr. Castro?

15 MR. LOWENTHAL: She's just a neurologist. She's not a
16 neuropsychologist.

17 THE COURT: I don't know whether I need a
18 neuropsychologist.

19 MR. LOWENTHAL: They concede, I think, after having
20 read the letter from Dr. Barr, who we submitted from NYU
21 medical school, that in fact a neuropsychologist is the one
22 who's qualified to express opinions.

23 THE COURT: Where is that?

24 MR. LOWENTHAL: Dr. Barr is Exhibit 7 to my
25 declaration.

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1 THE COURT: Frankly, I discounted the NeuroTrax myself
2 without having read or remembered this. But Dr. Braunstein, as
3 a neurologist, deals in her everyday practice or may deal in
4 her everyday practice with stroke victims. And one of the
5 consequences of a stroke victim are losses of memory.
6 Sometimes memory comes back. Sometimes they don't come back.
7 And sometimes they come back quickly and sometimes they come
8 back after a period of time. Generally speaking, the wisdom
9 with a stroke is what you get back quickly you have and after
10 that it's problematic.

11 MR. LOWENTHAL: Your Honor, the only point I'd make
12 and I'd like to look at what in fact Dr. Braunstein has
13 submitted to the Court because I think that is perhaps the most
14 telling of all. As your Honor pointed out, they put in this
15 letter from Dr. Joseph, who's a kidney specialist. One can't
16 rely on anything that he says. But if you do, his position --
17 and his is the only diagnosis -- is Mr. Santiago is permanently
18 disabled.

19 THE COURT: -- then nobody can.

20 MR. LOWENTHAL: Let's look, your Honor, if we can, at
21 Exhibit 3 to my declaration, which is Dr. Braunstein's medical
22 report, such as it is.

23 THE COURT: I'm looking at it.

24 MR. LOWENTHAL: Look at the top, please. It says
25 history of present illness. And further down there's a line,

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1 if you look six lines.

2 THE COURT: Let me find it. Where in your papers is
3 it?

4 MR. LOWENTHAL: It's my Exhibit 3 and it's the first
5 page to Exhibit 3.

6 THE COURT: All right. I've got it.

7 MR. LOWENTHAL: There's a line, the second bullet,
8 one, two, three, four, five, six. It states he has not
9 returned to work. Are you with me, your Honor?

10 THE COURT: I am. Give me a moment.

11 MR. LOWENTHAL: Sure.

12 THE COURT: I'm reading this. The patient is
13 concerned because he feels he cannot remember anything. When
14 he's actually asked questions, it appears that he does have the
15 ability to remember. But he's having problems with
16 organizational skills. This may be referable to his stroke. I
17 therefore would like him to get a neuropsychiatric evaluation
18 and cognitive rehabilitation. Otherwise, there are no other
19 new complaints.

20 So what we're having here -- I'll anticipate your
21 argument -- on an examination that occurred March 31, two
22 months after the stroke and on the eve of trial, which
23 basically says we need a lot of tests to know anything at all.

24 MR. LOWENTHAL: No, your Honor, I disagree with that.
25 She concludes that he doesn't have any problem answering

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1 questions. And beyond that she sets forth an exam that she did
2 which led her to that conclusion.

3 If you see under the section physical exam, the mini
4 mental status exam shows patient to be awake, alert, and
5 oriented times three, which is the most that you can be. The
6 patient is aware of where they are in terms of state, county,
7 and place. The patient is able to repeat three unrelated words
8 and recall them in five minutes. The patient is able to spell
9 words forward and backwards. The patient is able to repeat the
10 phrase no ifs, ands or buts. The patient is able to read
11 without difficulty.

12 So she did a test and her test showed he has no memory
13 problems. Only because he complained about it she ordered some
14 tests.

15 THE COURT: Let me.

16 MR. LOWENTHAL: May I say one final thing, if your
17 Honor will indulge me. When a letter was written to the Court
18 in which they tried to do this by informal letter, the
19 statement was we should have a hearing because we could examine
20 the doctors at a hearing. I can get the letter. That's what
21 the defendants said. On Monday when we received their papers
22 Friday night -- or at least the Santiagos. As you know, the
23 city didn't file their papers until late -- I wrote and said
24 I'd like you to bring Dr. Braunstein and Dr. Joseph so I could
25 cross-examine them here. And I was told --

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1 THE COURT: I didn't order any evidentiary hearing.

2 MR. LOWENTHAL: You ordered a hearing, your Honor, not
3 argument.

4 THE COURT: I did not have in mind any evidentiary
5 hearing at the time.

6 MR. LOWENTHAL: If that's the case, that's the case.
7 But, your Honor, I asked for them. They didn't bring them.

8 THE COURT: All right, Mr. Lowenthal.

9 MR. LOWENTHAL: They also didn't bring Santigo here,
10 which would have allowed you and us to observe him.

11 THE COURT: Mr. Lowenthal.

12 MR. LOWENTHAL: Yes.

13 THE COURT: No. 1, I'm going to make a number of
14 rulings today, but we're going to reassemble Wednesday at
15 4 o'clock to hear anything further from Dr. Braunstein and from
16 Mr. Santiago. They both need to be present if you want me to
17 rely on anything they say.

18 Given the record that's developed, the medical report
19 of Dr. Braunstein, as stated by Mr. Lowenthal, and the absence
20 of any prognosis three months after the stroke of when
21 Mr. Santiago will recover his faculties, if his faculties have
22 been appreciably diminished by his stroke, the trial will
23 proceed as scheduled.

24 I am not prepared to discount the anecdotal evidence
25 presented by Mr. Santiago's family and by Mr. Castro, but at

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1 this point in time, it is defendant's burden to show that a
2 continuance would be appropriate and that a continuance would
3 bring about an improved state of affairs for Mr. Santiago. I
4 have not been presented by any evidence that show that any
5 change is expected within any framework of time within the next
6 60 or 90 days, and I think anything beyond that will be
7 prejudicial to the plaintiffs. So we will be going ahead.

8 MR. LOWENTHAL: Your Honor, can I ask if any medical
9 records are going to be used that have not been produced to the
10 plaintiffs on Wednesday that they be provided to us by Tuesday
11 so we at least can review them.

12 THE COURT: By 4 o'clock, Tuesday, Mr. Castro.

13 MR. CASTRO: I understand, your Honor.

14 THE COURT: Anything else? Okay. Thank you very
15 much.

16 MR. CASTRO: Thank you, Judge.

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